is to prevent the imposition of forfeitures and penalties.[20] The aggrieved party may refuse the offer which would mitigate his loss, but if he does that he pursues a course not necessary to his own protection and must bear the consequences.

Several cases are apparently in conflict with the above view;[21] but of these only two seem to be irreconcilable.[22] The others can be explained on the ground that the plaintiff was in no position to accept the new offer; that the offer called for a surrender of rights under the old contract; or that it involved a radical departure from the terms of the old agreement.[23] It is argued that the defaulter can not call upon the wronged party to make a new contract for his benefit; that to deny the plaintiff damages for loss he might have avoided by accepting the defendants' new offer would encourage bad faith. But the acceptance of the new offer does not work to the defendant's advantage,[24] except in so far as the damage which might result from his breach is thereby held down to a smaller compass. And if there be any weight in these objections, they apply with equal force to the whole doctrine of mitigation of damages, which is fundamental in the common law.

RECENT CASES

ABATEMENT — PENDENCY OF AN ACTION IN WHICH PRESENT CLAIM MIGHT BE SET UP AS COUNTERCLAIM. — In an action for damages caused by a collision between the plaintiff's and the defendant's motor trucks, the defendant pleaded in abatement the pendency of an action by the defendant against the plaintiff for damages caused by the same collision. *Held*, that the action be dismissed. *Allen* v. *Salley*, 101 S. E. 545 (N. C.).

When a pending action will settle all issues between the parties, its pendency is ground for abatement of a subsequent action. *Stevens* v. *Home Savings Ass'n*, 5 Idaho, 741, 51 Pac. 779; *Disbrow Mfg. Co.* v. *Creamery Mfg. Co.*, 115 Minn. 434, 132 N. W. 913. But when the pending action will not in itself determine all issues, the defendant is generally allowed to elect whether to plead a cross demand by way of counterclaim or to bring a separate action on it. *Welch* v. *Hazelton*, 14 How. Pr. 97; *Douglas Co.* v. *Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045. See 1 SUTHERLAND, DAMAGES, 4 ed., § 187. The principal case compels the defendant to use his remedy of counterclaim. The

[20] "To excuse the injured party from dealing with the party in default would enable the injured party to adopt a course possibly dictated by a desire to injure another rather than to save himself." See Borden & Co. *v.* Vinegar Bend Lumber Co., 7 Ala. App. 335, 62 So. 245, 248 (1913). See J. H. Beale, Jr., "Damages upon Repudiation of a Contract," 17 YALE L. JOUR. 444.

[21] Frohlich *v.* Independent Glass Co., 144 Mich. 278, 107 N. W. 889 (1906); Cox *v.* Anoka Waterworks, etc. Co., 87 Minn. 56, 91 N. W. 265 (1902); Coppola *v.* Marden Orth & Hastings Co., 282 Ill. 281, 118 N. E. 499 (1917); Cook Manufacturing Co. *v.* Randall, 62 Iowa, 244, 17 N. W. 507 (1883).

[22] Cox *v.* Anoka Waterworks, etc. Co., *supra* (but thirty days had elapsed between the breach and the new offer); Frohlich *v.* Independent Glass Co., *supra*.

[23] See Cook Manufacturing Co. *v.* Randall, 62 Iowa, 244, 250, 17 N. W. 507, 510; Coppola *v.* Marden, etc. Co., 282 Ill. 281, 284, 118 N. E. 499, 500.

[24] Suppose A refuses to deliver on credit per agreement and he later offers to deliver for cash. If B pays him cash he gets the very thing he wanted and has his cause of action for the added expense involved, — in this case the loss of the value of the credit period. What does A gain thereby?

argument in favor of the result is that it prevents duplication of legal proceedings. In the principal case, the result is reached without injustice. The claims of the parties arose in the same transaction, and both would require the same evidence and witnesses. Both parties have evinced their readiness to bring their cases to trial at this time. But the decision cannot be supported on authority. See *Woody* v. *Jordan*, 69 N. C. 189; *Asher* v. *Reizenstein*, 105 N. C. 213, 10 S. E. 889. And a general application of a rule compelling counterclaim would be unjust. A plaintiff is not compelled to join two causes of action against the same defendant. *Brunsden* v. *Humphrey*, 14 Q. B. D. 141; *Reilly* v. *Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772. There would seem an even greater hardship in always compelling a defendant to try his cross action at the place of the plaintiff's choosing.

ADMIRALTY — JURISDICTION — EQUITABLE JURISDICTION — ACCOUNTINGS. — By the terms of a charter party, a demise of two ships for a term of years, the charterer was to pay the owner a certain sum each month and one half the net earnings after deducting these sums. At the end of the period the charterer was to return the ships in good repair with an equal amount of furniture and apparel. In a libel for the breach of the charter party it appeared that an accounting was incidentally involved. *Held*, that admiralty has jurisdiction. *Metropolitan S. S. Co.* v. *Pacific-Alaska Navigation Co.*, 260 Fed. 973 (Dist. Ct. S. D. Me.).

In adjusting the rights of litigants, courts of admiralty proceed on equitable principles. They may deny full recovery to a sailor guilty of misconduct during the voyage in which the wages in dispute were earned. *Macomber v. Thompson*, 1 Sumn. 384. And they may refuse to entertain libels in tort for assault when the libellants because of their wrongful conduct could recover only trivial damages. *Barnett* v. *Luther*, 1 Curtis, 434. Where, however, the relief asked in its nature involves the exercise of equitable jurisdiction, admiralty refuses to act. It does not, therefore, entertain a bill for the reformation of an instrument. *Williams* v. *Prov. Co.*, 56 Fed. 159. Nor does it adjudicate a libel brought mainly for an accounting, however simple. *Martin* v. *Walker*, Abb. Adm. 579; *The Zillah May*, 221 Fed. 1016. But if the accounting is incidental to the main cause of action, maritime in nature, admiralty gives complete relief, even if, as in the principal case, the accounting seems complex. *The Emma B.*, 140 Fed. 771. On principle, there is no reason why admiralty, in spite of its pride in its simple procedure, should make this distinction. Indeed, admiralty is obviously a court better fitted than equity to take jurisdiction of accountings arising out of maritime transactions. However, this distinction seems firmly established by judicial decision.

APPEAL AND ERROR — APPELLANT'S RIGHT OF DISMISSAL DENIED WHERE PREJUDICIAL TO APPELLEE. — The plaintiff in a replevin suit appealed from an adverse judgment in a county court to the district court. By statute the latter court had jurisdiction to try the cause *de novo*. (1907 NEB. COMP. STAT., § 7514.) By an order of the district court, he also regained possession of the chattel which had been restored to the defendant by execution on the county court's judgment. Five months later, the plaintiff, against the objection of the defendant, moved to dismiss the appeal and claimed an absolute right to have the motion granted. There is a statute providing that an appellant may dismiss without the consent of the appellee at any time before submission. (1913 NEB. REV. STAT., § 8547.) *Held*, that the motion to dismiss be denied. *Lemer* v. *Hunyak*, 175 N. W. 605 (Neb.).

Even in the absence of statute, the appellant has a right to have his appeal dismissed. *Hart* v. *Minneapolis, St. Paul, etc. Ry. Co.*, 122 Wis. 308, 99 N. W. 1019; *Derick* v. *Taylor*, 171 Mass. 444, 50 N. E. 1038. But this right is sub-